No. 02-890

Supreme Court, U.S.
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In The

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

DERRICK EASON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overrule longstanding precedent holding political subdivisions of the state are not entitled to Eleventh Amendment immunity when their legal liability does not run against the state and does not legally or practically obligate the state treasury.

PARTIES TO THE PROCEEDINGS

Petitioners are the Clark County School District, a political subdivision of the State of Nevada, Robert T. Henry, Beverly J. Minnear, Woodard Macke and Mila Kitt in their official and individual capacities.

Respondents are Derrick Eason, a minor, by his next friend and parent Serena Eason, and Shawn Witte, a minor, by his next friend and parent Teresa Witte who filed the underlying civil actions in this matter.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request this Court deny the petition for a writ of certiorari seeking review of the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-17a, is reported at 303 F.3d 1137. The ruling of the district court, Pet. App. 24a-30a, is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 11, 2002. No request for a rehearing was filed. The petition for a writ of certiorari was filed on December 10, 2002. This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

This action arises as a result of repeated physical, psychological and verbal abuse inflicted upon two students with disabilities at Variety School, a public school which provides education to only students with disabilities within the Clark County School District. Respondents are two young students with severe disabilities, Derrick Eason and Shawn Witte (Respondents Eason and Witte), who fell victim to repeated brutal practices at the hands of their teachers and other Clark County School District personnel including the "take down" where the students were pinned to the ground with their arms and legs forcibly crossed behind their backs while a teacher applied pressure to their buttocks or spines; being sprayed in the face with cold water; being forced to run or walk on the treadmill with weights tied to their ankles; having a teacher scream degrading comments at them; having vinegar put in their food; and being force fed food mixed with their own vomit.

Petitioners are the Clark County School District, a political subdivision of the State of Nevada, and four of its employees, Robert T. Henry, Beverly J. Minnear, Woodard Macke and Mila Kitt, named in both their individual and official capacities (Petitioner CCSD). Respondents Eason and Witte filed suit alleging causes of action based on 42 U.S.C. § 1983 for violations of their constitutional rights to substantive due process and equal protection; § 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. § 794;

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; and various state tort laws. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 12188(a)(1) and 28 U.S.C. § 1367.

The United States District Court for the District of Nevada, on a motion to dismiss for failure to state a claim, dismissed the action in its entirety after deeming Petitioner CCSD a state agency without any discussion of the facts or Nevada state law necessary for determining whether Petitioner CCSD is an arm of the state. Relying on *Belanger v. Board of Trustees of Madera Unified School District*, 963 F.2d 248, 254 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) the district court concluded Petitioner CCSD enjoyed Eleventh Amendment immunity because it is a school district. The district court reasoned that because Petitioner CCSD has the right to sue or be sued under Nev. Rev. Stat. § 386.010(3) (2001), Petitioner CCSD has waived only its common law sovereign immunity to be sued in Nevada courts thereby concluding "[i]t does not necessarily follow that the school district can be sued for monetary damages just because it can be sued in its own name." Pet. App. 29a. The district court ignored this Court's holding in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) that school districts are ordinarily not immune from suit, as well as the Ninth Circuit test for determining whether an entity is an arm of the state in contrast to a political subdivision, as articulated in *Belanger* itself.

Relying on *Mt. Healthy*, the Ninth Circuit reversed the district court's dismissal of Respondents Eason and Witte's § 1983 action. The Ninth Circuit found Petitioner CCSD, a political subdivision of the State of Nevada, "more like a local or county agency than like a state

agency." Pet. App. 15a. Furthermore, the Ninth Circuit reviewed and applied all the factors articulated in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989) consistent with this Court's prior holdings in determining Petitioner CCSD is not an arm of the state. Pet. App. 9a-15a.

Of significance, the Ninth Circuit found the first *Mitchell* factor, whether a money judgment will be satisfied out of state funds, "the most important consideration determining whether an entity is an arm of the state." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Ninth Circuit also referred to *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997), which focused on the potential legal liability of the state to satisfy a judgment when determining whether an entity is an arm of the state despite the legal obligation of another entity to indemnify the state. Pet. App. 9a. In determining whether a money judgment would be satisfied out of state funds, the Ninth Circuit looked not only for Petitioner CCSD to demonstrate the State of Nevada bore a legal obligation to satisfy any adverse judgment against Petitioner CCSD, but also looked at Petitioner CCSD's failure to demonstrate that any money withdrawn from its account to satisfy such a judgment would necessarily be replaced with state funds. Pet. App. 13a. Therefore, the Ninth Circuit considered whether the state would be legally liable to satisfy a judgment as well as practically liable to satisfy a judgment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

The Ninth Circuit decision finding Petitioner CCSD more like a county than an arm of the state and, among all other factors outlined in *Mitchell*, the state is not legally or

practically liable to satisfy a money judgment against Petitioner CCSD, is consistent with this Court's prior holdings, the holdings of other courts of appeals and also with other Ninth Circuit decisions. As such, there is no basis for this Court to grant Petitioner CCSD's petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

1. Certiorari is not warranted as there is no important issue of federal law and no conflict among the circuits as to whether local governmental agencies, including school districts, are protected by the Eleventh Amendment.

Longstanding and unbroken precedent of this Court has established that political subdivisions of the state (counties, municipal corporations and entities such as school districts that resemble counties and municipal corporations) are not entitled to Eleventh Amendment immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Mt. Healthy*, 429 U.S. at 280; *Pennhurst*, 465 U.S. at 123 n.34; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local governments"). Arms of the state (state entities that are so much a part of the state that they are entitled to the sovereignty of the state itself) are immune. Indeed, this Court in *Luning* specifically held Nevada counties and municipal or governmental corporations are not entitled to Eleventh Amendment immunity. *Luning*, 133 U.S. at 531.

This long and unbroken line of cases, which dates back over 110 years, establishes that the Eleventh Amendment only immunizes state governments, not local entities. *Luning*, 133 U.S. at 530 ("The constitution of the state of Nevada explicitly provides for the liability of counties in suit."); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("consistently [this Court has] refused to construe the [Eleventh] Amendment to afford protection to political subdivisions . . . even though such entities exercise a 'slice of state power'"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) ("Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.").

Although the determination of whether an entity is an arm of the state is a question of federal law, courts carefully scrutinize the state's statutes and case law creating that entity. *Doe*, 519 U.S. at 430 n.5. The test for determining whether an entity is an arm of the state is fact specific requiring courts to look at the "nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280.

In *Mt. Healthy*, in holding local Ohio school districts are not entitled to Eleventh Amendment immunity, this Court examined the characterization of the school district under state law; guidance and control received by the State Board of Education; the amount of funding received by the State; and the school districts' ability to issue bonds and levy taxes within certain restrictions of state law. *Id.* This Court found no immunity, because in Ohio, local school districts are defined as political subdivisions in state law, have extensive powers to bond and levy taxes, and are one of many local school boards. Thus, even though the state gave a significant amount of money to the

school district and exercised guidance over the districts, this Court found that it was not entitled to assert Eleventh Amendment immunity as it was more like a county or city than an arm of the state. *Id.*

Consistent with the Ohio school districts examined in *Mt. Healthy*, most school districts in the country are created by their state with state control and funding. Yet, "it is crystal clear that [counties, municipalities and school districts] are not entitled to immunity from suit in federal court" after *Mt. Healthy. Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (3rd Cir. 1989). Using the *Mt. Healthy* analysis, the courts of appeals have consistently found that most all school districts in the country are not entitled to Eleventh Amendment immunity. *See, e.g.*, *Cuesta v. Sch. Bd. of Miami-Dade County*, 285 F.3d 962, 966 (11th Cir. 2002) (Florida); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (North Carolina); *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997) (New Mexico); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993) (Utah); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509-11 (11th Cir. 1990) (Alabama); *Lester H. v. Gilhool*, 916 F.2d 865, 870-71 (3d Cir. 1990) (Pennsylvania); *Rosa R. v. Connelly*, 889 F.2d 435, 437-38 (2d Cir. 1989) (Connecticut); *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 353 (5th Cir. 1987) (Texas) (*citing Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1112 (5th Cir. 1980)), *overruled on another ground by Walton v. Alexandar*, 44 F.3d 1297 (5th Cir. 1995); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27 (2d Cir. 1986) (New York); *Minton v. St. Bernard Sch. Bd.*, 803 F.2d 129, 131-32 (5th Cir. 1986) (Louisiana); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (Illinois); *Stoddard v. Sch. Dist.*

No. 1, Lincoln County, 590 F.2d 829 (10th Cir. 1979) (Wyoming); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1121-23 (10th Cir. 1978) (Kansas); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975) (Mississippi). *But see Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992) (California); *De Levay v. Richmond County Sch. Bd.*, 284 F.2d 340 (4th Cir. 1960) (Virginia).

The Ninth Circuit consistently applied this Court's *Mt. Healthy* decision in *Mitchell* to find Petitioner CCSD was not an arm of the state entitled to Eleventh Amendment immunity. Specifically, under *Mitchell*, in determining whether an entity is an arm of the state for purposes of Eleventh Amendment immunity, the following factors are reviewed: 1) whether a money judgment would be satisfied out of state funds; 2) whether the entity performs central governmental functions; 3) whether the entity may sue or be sued; 4) whether the entity has the power to take property in its own name or only the name of the state; and 5) the corporate status of the entity. *Mitchell*, 861 F.2d at 201. These factors are consistent with this Court's prior holdings in determining whether an entity is an arm of the state and does not present an important issue of federal law.

Petitioner CCSD contends that each circuit applies different tests in determining whether an entity is an arm of the state. In fact, the tests are so similar there is no significant difference among them. Furthermore, in this case, any difference is immaterial because Petitioner CCSD is a political subdivision of the state under any of the circuit tests, not an arm of the state.

Petitioner CCSD states "the Fourth and Fifth Circuits consider important whether the entity performs traditionally state or local functions" and the Third Circuit has expressly rejected this factor. This is inaccurate. The Third Circuit has emphasized that whether the entity performs traditionally state or local functions is encompassed within the articulated factor "the status of the agency under state law" consistent with *Mt. Healthy* and other circuits. *Carter v. City of Philadelphia*, 181 F.3d 339, 347 n.21 (3d Cir. 1999). *See also*, *Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD contends only the Fourth and Seventh Circuits "look at whether the scope of the entity's authority is statewide or only regional." However, as stated in *Kashani v. Purdue University*, 813 F.2d 843, 847-48 (7th Cir. 1987), this Court in *Mt. Healthy* looked at whether the entity in question was formed with independent powers from the state as well as whether it served the state as a whole or only a region. *See Mt. Healthy*, 429 U.S. at 280 ("Petitioner is but one of many local school boards within the State of Ohio."). *See also, Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD asserts only the First and Eighth Circuits look at whether the entity's "property is subject to taxation by the State" instead of whether the entity can "hold property in its own name." This is misleading. For example, in *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92, 100 (1st Cir. 2002), the First Circuit analyzed if the entity has "the power to lease real property in its own name" in determining whether the property is subject to taxation by the state, consistent with *Mt.*

Healthy. *See also, Mitchell*, 861 F.2d at 201 (fourth factor: whether the entity has the power to take property in its own name or only the name of the state).

Petitioner CCSD contends only the Second and Seventh Circuits "expressly name how the governing entities are appointed" and by whom they are appointed as a factor. This is not true. Every circuit reviews how the governing entity is appointed when reviewing the degree of state versus local control granted to the entity. A review of whether local board members are elected by voters in the precinct they represent is encompassed within this review consistent with *Mt. Healthy*. *Ambus v. Granite*, 995 F.2d 992, 996 (10th Cir. 1993). *See also*, *Mitchell*, 861 F.2d at 201 (second factor: whether the entity performs central governmental functions).

Petitioner CCSD states the "Third, Fifth, Seventh and Eleventh Circuits expressly include the source of the entity's funding as a factor under the arm of the state doctrine." Actually, all circuits have noted this as "considerable importance" in determining if the state will be liable for a money judgment relying on *Doe*. *See also*, *Mitchell*, 861 F.2d at 201 (first factor: whether a money judgment would be satisfied out of state funds).

The articulation of various factors by various courts of appeals are varying ways of phrasing the same requirements outlined by this Court in order to determine the nature of the entity created by state law. The differences in phrasing are not a basis for concluding there is a circuit split or that this Court has failed to provide the circuits with guidance on the issue. All circuits apply a variety of factors, all of which are consistent with *Mt. Healthy* in determining whether an entity is an arm of the state.

Petitioner CCSD also claims the Ninth Circuit decision creates an intracircuit split, citing *Belanger*. In *Belanger*, the Ninth Circuit analyzed the local California school districts to determine if they were entitled to immunity. The *Belanger* court reviewed the *Mitchell* factors and distinguished the local California school districts from the school districts presented in *Mt. Healthy*. The court found persuasive that in California, the state has uniquely assumed responsibility for and control over school funding. As a result, the court found local California school districts are agents of the state itself. In California:

> The state sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit, and allocates the balance to the school district from the state school fund. In short, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.

Belanger, 963 F.2d at 252.

By virtue of this revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget. Thus, as the Ninth Circuit states, in California, any use of commingled funds is a use of state funds.

The Ninth Circuit, however, is careful to point out that "[i]n the critical area of school funding . . . California has selected a different path from that of most states." *Id.* at 254. This illustrates how, in the application of consistent factors, results will vary depending on how the entity

is created by state law. This does not illustrate that there is disarray among circuits or within the Ninth Circuit. Since Ninth Circuit precedents are consistent with *Mt. Healthy*, there is no reason to review what the Ninth Circuit has done here.

As outlined by the Ninth Circuit, given the vast similarities between Petitioner CCSD and the local Ohio school districts examined in *Mt. Healthy*, a finding that Petitioner CCSD is more like a local or county agency than like a state agency does not present an important issue of federal law or conflict with any of this Court's prior decisions. Such a finding is thoroughly consistent with this Court's prior holdings finding local governmental agencies are not entitled to Eleventh Amendment immunity. Therefore, this Court should deny Petitioner CCSD's petition for a writ of certiorari.

2. Certiorari is not warranted as the Ninth Circuit, consistent with this Court's precedents and other circuits, correctly found Petitioner CCSD is a political subdivision of the state rather than an arm of the state.

The Ninth Circuit correctly applied this Court's precedents in finding Petitioner CCSD is a political subdivision of the State of Nevada rather than an arm of the State of Nevada. The Ninth Circuit did so by applying the *Mitchell* factors which are consistent with decisions of this Court. The tests used by all other circuits, which are also consistent with decisions of this Court, would also lead to the same result. In making its ruling; the Ninth Circuit considered the following:

First, the Ninth Circuit looked at whether a money judgment would be satisfied out of state funds. Pet. App. 9a-13a. "The question whether a money judgment against a State instrumentality or official would be enforceable against the state is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." *Doe*, 519 U.S. at 430. In *Hess*, this Court focused on whether "legally and practically" the state is obligated to bear and pay the resulting indebtedness of the entity in question in determining whether Eleventh Amendment immunity is implicated. *Hess*, 513 U.S. at 36. Subsequently, in *Doe*, this Court focused on the "entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance" without indicating whether an entity is entitled to Eleventh Amendment immunity if the practical effect of the judgment is to obligate the state to pay. *Doe*, 519 U.S. at 431.

The Ninth Circuit found there is no statutory provision requiring the State of Nevada to satisfy its school districts' debts. Pet. App. 10a. As in *Mt. Healthy*, and consistent with most all other school districts around the country, Nevada local school districts receive state funding. However, as the Ninth Circuit found, local funds lost to satisfy a money judgment will not be replaced with state funds. Pet. App. 11a.

Nevada's educational funding scheme, known as the Nevada Plan, has a "basic support or guarantee" consisting of state funds to guarantee that each school district has that minimum amount to be spent per pupil. *Id.* The amount of money each school district receives from the state varies. However, each school district is obligated to

earmark certain locally generated revenue to the minimum budget. This locally generated revenue is subtracted from the state guaranteed basic support and the difference (if there is any) is provided by the state. Pet. App. 11a-12a.

In Nevada, school districts may generate local revenue beyond the amount allocated to the guaranteed basic support. Pet. App. 12a. This additional local revenue is considered "outside" the Nevada Plan formula. When these local revenues exceed or fall short of estimates, the amount of money the school district receives from the state does not decrease or increase. As stated by the Ninth Circuit:

> Because the state guarantees only a minimum amount of per pupil spending, not a maximum, and because school districts may generate funds in addition to those provided by the state, an amount withdrawn from a school district's account in order to satisfy a money judgment will not be replaced with state money.

Pet. App. 12a.

The Ninth Circuit found Petitioner CCSD could not demonstrate the State of Nevada bore a legal obligation to satisfy any adverse judgment against it. Pet. App. 13a. The Ninth Circuit found Petitioner CCSD could not demonstrate that any money withdrawn from its account to satisfy a judgment would be replaced with state funds. *Id.* Furthermore, the Ninth Circuit determined that given the independent governing and taxing authority of Petitioner CCSD and the legal non-liability of the state, Petitioner CCSD "as a practical matter" is liable for the judgment. The Ninth Circuit added that there was no showing on the record that the state, "as a practical

matter," would be liable for the judgment. *See Pennhurst*, 465 U.S. at 123 n.34 (finding practical liability if the suit seeks relief that would run against the state if the state could be sued; in the absence of legal liability or direct state control, state funding contributions do not make political subdivisions of the state part of the state itself); *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945) (suit against state treasurer in official capacity for tax "refund" is, in effect, suit against the state). Thus, when the Ninth Circuit analyzed the first factor of the *Mitchell* test, it included an analysis of whether the state would be legally and practically liable for a money judgment consistent with this Court's prior holdings.

Next, the Ninth Circuit found "[o]n balance, Nevada does not 'treat[ ] public schooling as a state-wide or central governmental function.'" Pet. App. 13a. The State of Nevada created the school system and agreed to provide for its support, Nev. Const. art. 11, §§ 2 and 6 (2001), and the county school districts are "political subdivisions . . . whose purpose is to administer the state system of public education." *Id.*; Nev. Rev. Stat. § 386.010 (2001). Nonetheless, the legislature has expressly "reaffirm[ed] its intent that public education in the State of Nevada is essentially a matter for local control by local school districts." Pet. App. 13a; Nev. Rev. Stat. § 385.005 (2001) ("Declaration of legislative intent"). Moreover, the Ninth Circuit specifically found that Petitioner CCSD "cannot point to any authority supporting the proposition that Nevada school districts are 'treated as state agencies under [Nevada] law' or that '[Nevada] law is well settled that providing public education is a state function.'" Pet. App. 13a. Rather, local school districts possess "such rights and powers as are necessary to maintain control of education of the children

within their respective districts." Pet. App. 14a; Nev. Rev. Stat. § 385.005 (2001). *See also*, Nev. Rev. Stat. § 386.350 (2001) (defining general powers of board of trustees of school district).

In reviewing the remaining *Mitchell* factors, Pet. App. 14a-15a, the Ninth Circuit found each county school district in Nevada has the power to sue and be sued under Nev. Rev. Stat. § 386.010(3) (2001) and the school districts are not required to take property only in the name of the State of Nevada. The board of trustees, which runs the school district and the schools within that district, Nev. Rev. Stat. § 386.350 (2001), holds, manages and controls school district property. Nev. Rev. Stat. §§ 393.010, .030 (2001). The board of trustees has custody of the schoolhouses, and it may insure "the schoolhouses, furniture and school apparatus." Nev. Rev. Stat. § 393.020 (2001). Further, the board may sell, rent or lease real property belonging to the school district when it is "necessary or for the best interests of the school district." Nev. Rev. Stat. § 393.220 (2001). Finally, even though the school district itself is not a corporation, each board of trustees is a corporation. Nev. Rev. Stat. § 386.110 (2001).

The analysis of the other *Mitchell* factors is consistent with *Mt. Healthy* and *Luning*. The Ninth Circuit did determine the legal and practical effect a money judgment against Petitioner CCSD would have, or in this case not have, on the State of Nevada and properly analyzed the remaining factors of *Mitchell* in determining Petitioner CCSD is a political subdivision of the state and not an arm of the state entitled to Eleventh Amendment immunity.

Given the consistency between the circuits in applying the factors, there is not one circuit that would have found

Petitioner CCSD entitled to Eleventh Amendment immunity. In developing the factors the circuits have necessarily focused on the facts of the cases presented to them. This has resulted in variations in the articulation of the factors but all of the factors set out rules and provide for consistent results which are faithful to the principles outlined in *Mt. Healthy*. No circuit rules out consideration of any factors articulated by other circuits.

For example, the specific factors identified by the Fourth and Fifth Circuits in reviewing whether an entity performs traditionally state or local functions was applied by the Ninth Circuit which found Petitioner CCSD is financed in a manner to ensure local control and local administration with significant autonomy vested in the local school boards. Nev. Rev. Stat. §§ 386.350, 354.474 (2001). The Fourth and Seventh Circuits' review of whether the scope of the entity's authority is statewide or only regional was also analyzed by the Ninth Circuit in finding Petitioner CCSD is one of many local school districts within the State of Nevada which maintains "such rights and powers as are necessary to maintain control of education of the children within their respective districts." Nev. Rev. Stat. § 385.005 (2001). The First and Eighth Circuits identification of whether the entity's property is subject to taxation by the State is also consistent with the Ninth Circuit's finding that the board of trustees run the school district and the schools within that district, Nev. Rev. Stat. § 386.350 (2001), and holds, manages and controls school district property. Nev. Rev. Stat. §§ 393.010, .030 (2001). Furthermore, the board of trustees may sell, rent or lease real property belonging to the school district. Nev. Rev. Stat. § 393.220 (2001).

Factors articulated by the Ninth Circuit, as well as all other circuits, in determining whether an entity is an arm of the state, all provide for a consistent determination in accordance with *Mt. Healthy* standards even though the tests are worded slightly different. As discussed above, all the circuits would have determined Petitioner CCSD to be a political subdivision of the state. None of the circuits would have determined Petitioner CCSD to be an arm of the state. This case does not involve a close question as to whether Petitioner CCSD is an arm of the state. *See, e.g., Ford Motor Co.*, 323 U.S. at 464 (conduct of state officer considered conduct of state itself); *Pennhurst*, 465 U.S. at 123 n.34 (conduct of state department and state institution considered conduct of state itself); *Edelman*, 415 U.S. at 668-69 (conduct of county employee considered conduct of state itself when identical to state conduct resulting in liability).

Finally, Petitioner CCSD cites *Duke v. Grady Municipal Schools*, 127 F.3d 972 (10th Cir. 1997) for the proposition that the Ninth Circuit, like *Duke*, rejected consideration of the practical effect a money judgment would have on the state in determining whether a governmental entity's money judgment sought is to be satisfied out of the state treasury. To argue the Ninth Circuit rejected the inquiry as to whether the state is "practically" obligated to pay a money judgment ignores the Ninth Circuit holding. The Ninth Circuit thoroughly recognized and reviewed Nevada's educational funding scheme and contrasted it with that found in California. Pet. App. 10a-13a. The Ninth Circuit held the State of Nevada is not legally required to satisfy any judgment against Petitioner CCSD and also that state funds would not be obligated to satisfy any such adverse judgment. Pet. App. 15a.

In contrast, while interpreting *Doe* to require it to focus on legal liability for a judgment, rather than practical or indirect impact a judgment would have on a state's treasury, the *Duke* court concluded that since the State of New Mexico is not legally liable for a judgment against a local school district that such are not entitled to Eleventh Amendment immunity. *Duke* is not inconsistent with this Court's precedents, including *Mt. Healthy*, in that the *Duke* court found the liability of the school district "would not run against the state." *Pennhurst*, 465 U.S. at 123 n.34. In any event, the question squarely raised in *Duke* is not properly before this Court at this time because the Ninth Circuit decision did consider both the legal and practical effect a money judgment would have against Petitioner CCSD. The Ninth Circuit properly determined any liability against Petitioner CCSD "would not run against the state."

Petitioner CCSD is arguing for further "clarity" on a test that, under any interpretation they put forward, as demonstrated above, finds them not entitled to Eleventh Amendment immunity. Consistent with this Court's precedents and other circuits, Petitioner CCSD is a political subdivision of the State of Nevada. There is no reason justifying a grant of Petitioner CCSD's petition for a writ of certiorari by this Court.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

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